In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-92

JOHN SHERMAN MILES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court erred in overruling his motion for judgment of acquittal because there was no evidence that use of the mails played any part in the execution of his scheme to defraud.

An indictment (Tr. 320-323) returned in the United States District Court for the Western District of Missouri charged that petitioner, together with Robert Totten and Gary Morris, participated in a fraudulent scheme to buy cattle from a cattle sales barn in Fair Play, Missouri. The scheme involved payment with a check drawn on a nonexistent bank account, followed by disposition of the cattle before the check cleared normal banking channels and thus before the seller discovered that the check was worthless and took steps to repossess. Following a jury trial, petitioner was found guilty as charged (Tr. 331-332). The court of appeals affirmed (Pet. App. A5-A13; 483 F. 2d 1372).

On March 18, 1974, the petition for a writ of certiorari in this case was granted, the judgment vacated, and the case remanded to the court of appeals for further consideration in light of *United States* v. *Maze*, 414 U.S. 395. *Miles* v. *United States*, 415 U.S. 970. Upon reconsideration, the court of appeals again affirmed petitioner's conviction, *per curiam*, finding that the delay in processing the check was part of the fraudulent scheme (Pet. App. A1-A2).

Petitioner, Totten, and Morris devised a scheme whereby Totten and Morris would buy cattle from the Fair Play Sales and Auction Company with a check drawn on a non-existent account in a bank in Leeton, Missouri, using a false driver's license in the name of "John W. Rogers" as identification. Petitioner supplied the blank counter check from the Leeton bank, as well as the false driver's license (Pet. App. A7). Petitioner, who had been in the business of buying and selling cattle for years, picked February 21, 1972, as the date to "buy" the cattle, since that was a holiday and the bank at Leeton, upon which the no-account check was drawn, would be closed. The plan called for the cattle to be picked up at the auction barn and delivered to petitioner's farm to be resold before the worthlessness of the check was discovered, the three men dividing the proceeds equally (Pet. App. A7). According to Totten, they discussed the fact that the cattle should be disposed of as soon as possible, within a week at most, because that was how long they estimated it would take for the check "to come back to the place where you wrote the check before they found out it wasn't any good" (Tr. 195; Pet. App. A7-A8. "That way, I [Totten] could get my money and get out of town" (Tr. 194). The fraudulent scheme was executed as planned, but the three men were apprehended on February 28 after the fraud had been discovered (Pet. App. A7). By that time, the no-account

check had cleared banking channels through use of the mails and had been returned to the bank in Fair Play, Missouri, where it had initially been deposited on February 22, following the fraudulent purchase of the cattle (Tr. 75, 102, 105-107, 109, 127, 129, 130-131, 145).[1]

Petitioner argues that this Court's decision in *United States* v. *Maze, supra*, requires the reversal of his conviction because the fraudulent scheme was completed before the worthless check entered the mail, and because the use of the mails to transmit the check through banking channels "was merely collateral or incidental to the full scheme" (Pet. 6). Neither of these contentions is well founded.

To constitute an offense under 18 U.S.C. 1341, there must be proof that petitioner "caused" the mails to be used "for the purpose of" executing a fraudulent scheme.[2] Here, as in *Maze*, the evidence was sufficient to support a jury finding that petitioner "caused" the mails to be used within the meaning of the statute. See *Pereira* v. *United States*, 347 U.S. 1, 9. However, unlike *Maze*, here the use of the mails was an integral part of petitioner's fraudulent scheme.

In *Maze*, the defendant was charged, *inter alia*, with having obtained goods and services at four specified motels by presenting a stolen BankAmericard for payment and representing himself to be the true owner. The indictment alleged, as violations of 18 U.S.C. 1341:

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[1]The check was returned to the Fair Play bank on February 25, 1972 (Tr. 109, 129-131).

[2]18 U.S.C. 1341 provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * for the purpose of executing such scheme or artifice or attempting so to do * * * knowingly causes to be delivered by

> [T]hat respondent knew that each merchant would cause the sales slips of the purchases to be delivered by mail to the Louisville bank which would in turn mail them to [the true owner of the card] for payment. The indictment also charged that the delay in this mailing would enable the respondent to continue purchasing goods and services for an appreciable period of time.

United States v. *Maze*, *supra*, 414 U.S. at 397. This Court determined that the acts of the defendant in that case did not constitute a violation of 18 U.S.C. 1341, because each separable fraudulent scheme reached fruition before the mails were used to transmit the sales slips, and the mailings, therefore, served no purpose in the fraudulent scheme.

Here, however, petitioner's scheme was not simply to obtain cattle through the use of a worthless check, but to convert those cattle into cash proceeds by reselling them. This fraudulent scheme was in fact continued until the time petitioner and his confederates were apprehended. Thus, petitioner's assertion that the "scheme reached fruition when the cattle were received for the no-account check" is incorrect (Pet. 9). The facts in this case are clearly distinguishable on that basis from those in *United States* v. *Maze, supra,* as well as *Kann* v. *United States*, 323 U.S. 88, and *Parr* v. *United States*, 363 U.S. 370, cited therein. Unlike those cases, the fraudulent scheme here had not reached fruition at the time of the mailings, and it was not immaterial to petitioner how the payee of the no-account check and the various banks would go about collecting payment on the check. Petitioner was

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mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed any [matter or thing whatever to be sent or delivered by the Postal Service] * * * shall be fined not more than $1 000 or imprisoned not more than five years, or both.

relying upon the time involved in transmitting the check through normal banking channels as an integral part of the fraudulent scheme to dispose of the easily identifiable cattle. Such "a deliberate, planned use of the mails" (*United States* v. *Sampson*, 371 U.S. 75, 80) in furtherance of a scheme to defraud clearly falls within the purview of 18 U.S.C. 1341. See, *e.g.*, *United States* v. *Owen*, 492 F. 2d 1100, 1103 (C.A. 5), pending on petitions for writs of certiorari, Nos. 73-1946, 73-6978; *United States* v. *Flaxman*, 495 F. 2d 344, 348, 349 (C.A. 7), pending on petition for a writ of certiorari, No. 73-1894.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[3]

ROBERT H. BORK,
Solicitor General.

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[3]Petitioner's contention that his fraudulent scheme affected only the State of Missouri and should not be the subject of a federal prosecution is without merit. If, as we assert, petitioner's conduct was violative of federal law, the fact that he could have also been prosecuted under state law does not preclude prosecution for a violation of 18 U.S.C. 1341. *Parr* v. *United States*, *supra*, 363 U.S. at 385; *United States* v. *Flaxman*, *supra*, 495 F. 2d at 349. Moreover,because this case involved fraudulent use of a federally operated facility, the mails, cases interpreting the Travel Act (18 U.S.C. 1952) are wholly inapposite insofar as they address the question of the substantiality of federal or interstate nexus upon which conviction may be predicated.